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Subject: Inside EPA: Emerging Damages Claims Could Help Drive Push For Fracking Rules Posted: August 16, 2010

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Mounting public concern over possible water and air pollution from hydraulic fracturing, the controversial natural gas drilling process, is prompting new tort claims against extraction companies and could pressure the industry to seek new EPA or state regulations to help head off any potential future civil liabilities. One informed source says that concerns over contamination from so-called fracking operations could lead to the "next frontier" of environmental tort litigation -- echoing massive nuisance cases such as those over methyl tertiary butyl ether (MTBE) water contamination filed by communities in more than a dozen states. Some observers believe that if the threat of civil lawsuits over alleged fracking risks becomes stronger and plaintiffs file a slew of suits in varying states, it could pressure industry to try and preempt the suits, perhaps through agreeing to new federal fracking rules. Environmentalists, state attorneys general and others have long viewed damages suits as a key tool to pressure industry to agree to new or stricter regulations -- especially in cases such as fracking where they view industry practices as unregulated or insufficiently regulated. In the case of fracking, tort litigation "does not fill regulatory gaps. It can act as a deterrent but by no means is it a substitute for good regulation," one environmentalist says. The source says that tort suits could help to highlight what critics say is a need for stricter state and federal regulation of the process of hydraulic fracturing. Fracking is a process where operators inject chemical-laced fluids into underground rock to release gas. The process has led to increased estimates of available gas reserves but is also prompting growing public concern about increased risk of drinking water contamination -- especially since Congress in the 2005 energy law largely exempted the practice from EPA's drinking water rules. While environmentalists and some Democrats have sought to reinstate EPA's authority, industry has strongly resisted new regulations, saying the practice is safe and warning new rules would drive up drilling costs and gas prices. Congress in 2009 asked EPA to study what risks the practice poses to drinking water and the agency is now working to design the study. The agency is also weighing other regulatory authorities, such as the Clean Water Act and Endangered Species Act, to address fracking concerns, and environmentalists recently urged the agency to investigate alleged unlawful use of diesel fuel in fracking fluid. And key gas drilling states, including Pennsylvania and Wyoming, have already moved to strengthen their regulations. But despite the nascent regulatory efforts, local citizens are increasingly concerned about contamination and other risks. A handful of citizens in Dimock Township, PA have already filed civil lawsuits against Cabot Oil & Gas Corp. seeking cleanup of contaminated wells, the creation of a medical trust fund and other damages that the citizens say stem from stray fracking gas that contaminated their water and made them ill. As fracking operations spread through states across the country -- including non-traditional energy states like New York and Michigan -- such suits could multiply, especially as concerns grow in those states over drinking water contamination. One informed source says that as hydraulic fracturing becomes an increasingly prominent industry, the odds increase that similar tort suits will become the "next frontier of personal injury and property claims." The source draws parallels with ongoing litigation filed by towns and communities in more than a dozen states seeking damages against the oil industry for alleged contamination of their water supplies for groundwater contamination from MTBE, the widely used petroleum additive that EPA declined to address under federal waste laws.

More Civil Fracking Suits

One industry source agrees there will be more civil fracking lawsuits in the future. Citing the Dimock lawsuit over fracking contaminating wells, the source says, "I expect that others are not far behind." Sources say that among the most likely environmental releases from fracking operations that could provide grounds for litigation are so-called stray gas leaks that contaminate aquifers and contaminate private water wells -- as was the case in Dimock. Other risks include toxic emissions from fracking, chemical runoff from fracking sites reaching navigable waters, and chemicals used in fracking getting into groundwater because fracking occurs thousands of feet below bedrock. But the industry source says the latter scenarios are likely to be difficult for plaintiffs to prove. "There is absolutely no evidence in any report that the chemistry used underground in a fracking job has contaminated an underground source of drinking water," the industry source says. And the source says runoff from fracking sites is extremely rare, adding that unpermitted surface discharges from fracking only occurs at sites that are not adequately overseeing the practice. The source says it might be less difficult for plaintiffs to draw a connection between stray gas being disturbed by fracking and contaminated wells with high levels of the gases. "This is not the gas that companies are trying to get out," the source says, rather it is gas underground that migrates to groundwater as a side-effect of drilling. Another possible avenue for tort litigation could be to file claims for personal injury associated with toxic emissions from equipment used for fracking, drilling and distribution, sources say, adding that this could be more likely in states such as Texas where emissions are more of a concern than drinking water contamination. The Texas Commission on Environmental Quality has recently been studying the risk of emissions from oil and gas operations in the state. The environmentalist says it is important to scrutinize all phases of fracking operations, not just the injection of fracking fluids to break up bedrock. "I think there is the potential for tort litigation but I don't think fracking is well understood" by the public -- for example, there may be confusion over whether fracking should define just the injection of chemicals underground, or whether it should cover all operations at a fracking site. Regardless, the source says that "industry seems to treat lawsuits as the cost of doing business and will fight everything." Only if fracking tort litigation reached the scale of MTBE suits would industry "start changing their processes" at fracking sites, the source says. Further, tort suits have downsides in that they respond to -- rather than prevent -- a harm, and litigation can also take years before there is a definitive outcome. The source says that states "need to act more aggressively" and update and tighten their fracking regulations, adding that the Obama administration and Congress should also address fracking at the federal level. "Industry really needs to take notice here and be a lot more preemptive and proactive" to reduce potential risks, the informed source adds. "For the oil and gas industry writ large, if they can put this type of litigation to bed it's in their interest to do so" before there is a proliferation of civil suits against fracking across the country, the source adds. The source notes that many of the plaintiffs involved in tort litigation over MTBE contamination of water

supplies are towns and communities, and that fracking tort claims in the future could similarly be driven by towns, communities and private citizens. "Does industry really want to roll the dice on a jury trial in New York where New Yorkers are extremely sensitive about their drinking water? If any of these cases went to jury trial then industry would lose," according to the source.

Even so, the informed source does not expect a massive expansion in fracking lawsuits until "something really big happens" in terms of adverse public health impacts linked to fracking.

Public Focus On Fracking Risks

In another sign of the intense public focus on the potential risks from fracking, EPA announced Aug. 10 that it postponed a planned Aug. 12 public meeting in upstate New York on its fracking study in part due to concerns that it was not able to safely accommodate an estimated 8,000 citizens who planned to attend -- more than four times the agency's original estimate.

A similar meeting July 22 outside of Pittsburgh, PA, drew nearly 1,200 people, with approximately 120 speakers weighing in on the issue. That meeting followed two others in Texas and Colorado.

But the planned meeting in Binghamton, NY, was expected to draw an even bigger crowd due to growing concerns in the state about the risks posed to the state's drinking water supply by fracking. The state Senate recently approved a temporary moratorium on new fracking permits and the state Assembly is being pressured to vote on the measure soon.

"EPA didn't have a good sense of what the public interest would be," the environmentalist says. -- *Anthony Lacey*